# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 99

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MARION A. BURT BECK, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 29a-76a) are reported at 15 T.C. 642. The *per curiam* opinion of the Court of Appeals (R. 409) is reported at 194 F. 2d 537.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1952 (R. 410). The time for

filing a petition for a writ of certiorari was extended to and including June 3, 1952, by Mr. Justice Reed (R. 411). The petition for a writ of certiorari was filed June 3, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether the evidence supports the Tax Court's finding as to the fair market value (as of March 2, 1919) of certain iron ore lands inherited by taxpayer and others.

2. Whether the Commissioner's revision of taxpayer's depletion allowances on her one-sixth interest in the iron ore lands for the years 1938 through 1941, based upon an increase over 1919 in the estimated recoverable ore from the lands, was proper under Section 23 (m) of the Internal Revenue Code.

3. Whether royalty payments retained by the trustee-executor of the estate of taxpayer's father, pursuant to a compromise agreement and subsequent agreement of the parties, constituted income from the inherited lands which was applied to the payment of a legal obligation or indebtedness of the heirs in connection with the payment of federal estate and state inheritance taxes, so that one-sixth of the royalties retained during the taxable years was income to taxpayer, one of the heirs.

4. Whether taxpayer was entitled under Section 23 (o) of the Code to deduct purported gifts to an educational trust of her supposed, but actually non-existent, interest in a trust created under her father's will.

## STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra*, pp. 17-25.

## STATEMENT

In the Tax Court the case involved six issues, all of which were decided against taxpayer (R. 51a-76a). The Court of Appeals affirmed on the opinion of the Tax Court (R. 409). In this Court taxpayer raises four of the six issues. The facts found by the Tax Court on those four issues (found from a stipulation of facts, exhibits and oral testimony) are as follows:

### FACTS RELATING PRIMARILY TO ISSUES I AND II—VALUE OF THE IRON ORE LANDS AS OF MARCH 2, 1919, AND DEPLETION ISSUE.

The taxpayer, under the will of her father, Wellington Burt, as modified by a compromise agreement approved by the Michigan courts, acquired a one-sixth interest in certain iron ore lands (R. 32a-33a).

As of March 2, 1919, the date of the taxpayer's father's death, the Commissioner determined the fair value of Burt's fee interest in the iron ore lands to be $5,497,576.43, on which value the fed-

eral estate tax was paid (R. 47a). The value of the taxpayer's interest, as of March 2, 1919, was, accordingly, $916,262.74 (R. 47a). The executors of the estate (who did not include taxpayer) had valued the lands at $5,195,479 (R. 47a). The Commissioner's valuation was based on an estimate, made by the executors and accepted by the Commissioner, that the lands contained about 54 million tons of ore (R. 47a, 48a). The executors' estimate was in turn based on the report to the Minnesota Tax Commission, checked by the School of Mines of the University of Minnesota, of Oliver Iron Mining Co., which leased the lands (R. 47a-48a). The lessee used the best engineering and mining practices available in estimating the quantity of ore as of March 2, 1919 (R. 49a).

On the basis of the foregoing figures respecting the value of her interest in the ore lands and the quantity of ore in such lands, as of March 2, 1919, the taxpayer took a deduction from her share of the lessee's royalty payments of $.1018 per ton of ore. At this rate the taxpayer was allowed as depletion a total of $590,140.42 for the years 1919 to 1937 inclusive (R. 47a).

In fact, however, as the table in the margin shows, operation of the mine revealed that its reserves of iron ore were larger than had been estimated in 1919, so much so that by the end of 1937, after the removal of nearly 27,000,000 tons of ore, the lessee estimated that more than

52,000,000 remained. (R. 48a).[1] This fact was known to the taxpayer prior to 1938 (R. 49a). Accordingly, the Commissioner, acting under Section 23 (m) of the Code, in 1943 revised the prior estimate and recomputed the taxpayer's depletion allowance for the years here in question in such manner as to allocate the remaining undepleted balance of the taxpayer's share of the 1919 value over the remaining years of production

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[1] The following table shows the ore mined and the ore reserves estimated by the lessee (as submitted to and accepted by the Minnesota tax authorities):

| Date | Estimate of Reserves | Tons Mined |
|---|---|---|
| January 1, 1919 | 54,012,682 | 1,229,224 |
| " 1920 | 54,485,442 | 1,656,563 |
| " 1921 | 53,621,093 | 146,067 |
| " 1922 | 53,604,171 | 335,939 |
| " 1923 | 53,393,811 | 356,021 |
| " 1924 | 52,999,154 | 593,222 |
| " 1925 | 52,580,583 | 952,368 |
| " 1926 | 54,304,543 | 1,060,196 |
| " 1927 | 53,207,031 | 594,304 |
| " 1928 | 52,807,712 | 1,865,477 |
| " 1929 | 52,180,778 | 1,906,689 |
| " 1930 | 50,944,198 | 1,919,497 |
| " 1931 | 52,531,010 | 1,808,708 |
| " 1932 | 53,349,690 | 620,119 |
| " 1933 | 56,875,369 | 2,636,520 |
| " 1934 | 54,136,860 | 2,523,327 |
| " 1935 | 51,996,644 | 2,750,715 |
| " 1936 | 49,431,972 | 2,064,459 |
| " 1937 | 52,612,458 | 1,904,272 |
| | Total | 26,943,687 |

on the basis of current estimates of ore reserves (R. 50a-51a).[2]

FACTS RELATING PRIMARILY TO ISSUE III—PAYMENT OF FEDERAL ESTATE AND STATE INHERITANCE TAXES BY THE TRUSTEE FOR THE HEIRS, INCLUDING TAXPAYER.

Under the terms of the compromise agreement which modified Burt's will, the Burt heirs were charged with that proportion of the federal estate tax and state inheritance taxes which the value of the money and the iron ore lands they received under the compromise agreement bore to the total value of the estate. Also under the terms of the compromise agreement and as a means of financing the payment of these taxes, the trustee agreed to advance and loan to the heirs, from the general funds of the estate in its possession, an amount sufficient to pay the heirs' proportionate share of the taxes due from Burt's estate (which was $1,356,400 (R. 63a)). This money was to be repaid by the heirs in 26 annual payments, to begin five years from the date of the final decree approving the compromise agreement. As security for the repayment of this loan and in accordance with the compromise agreement, the

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[2] The depletion rate arrived at by the respondent for each of the taxable years was as follows:

| | |
|---|---|
| 1938 | .0096048 |
| 1939 | .0086883 |
| 1940 | .0083148 |
| 1941 | .0070086 |

trustee under the will held in trust the iron ore lands received under the terms of the compromise agreement. In a separate instrument the heirs also gave the trustee a mortgage on the land (Ex. 4-D, R. 130a-142a) as further security. Under the compromise agreement the trustee also had the full power to manage those lands to protect its security (R. 34a-35a). Under a subsequent modification of this agreement between the trustee and the heirs (R. 37a, 157a-158a), the trustee, out of the royalties paid by the lessees, credited to its account in reduction of the loan to the heirs, amounts of $56,516.67 annually, in two equal installments, beginning July 1, 1926, through July 1, 1949 (R. 38a).

FACTS RELATING PRIMARILY TO ISSUE IV—DEDUCTIONS FOR CHARITABLE CONTRIBUTIONS.

In 1940, the taxpayer was advised by competent legal counsel that she had a vested remainder interest in a trust of personalty created under the will of her father (R. 41a-42a). In each of the years 1939, 1940 and 1941, she transferred an undivided one-fiftieth of this supposed interest to her husband, her nephew and her attorney, as trustees of a fund intended to advance the education of the public in the field of oriental landscape gardening by assuring the maintenance of the oriental landscaping of her own estate, "Innisfree" (R. 39a). In her income tax returns for each of these years the respondent listed as a

charitable contribution the sum of $20,000 as the present value of the interest transferred in each year to the "Innisfree" trust (R. 43a).[3] In 1947, however, after prolonged litigation between the taxpayer and other heirs, the Supreme Court of Michigan construed the will of the taxpayer's father in such manner as substantially to deprive the taxpayer of any interest in the trust. *Hay* v. *Hay,* 317 Mich. 370 (R. 42a, 43a). The Commissioner refunded gift taxes which the taxpayer had paid upon the transfer of her putative interest and, by the same token, disallowed the income tax deductions for that part of the maximum of 15 per cent of net income which was represented by these "gifts" (R. 43a).

## ARGUMENT

1. The taxpayer's basis for depletion under Section 23 (m) of the Internal Revenue Code (Appendix, *infra, p.* 18) on her inherited one-sixth fee interest in the iron ore lands is the fair market value of that interest on the date of her father's death, March 2, 1919.[4] Internal Revenue Code, Sections 113(a)(5), 114(b)(1) (Appendix,

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[3] The corpus of the trust of personalty was valued at $6,900,000 in 1940, at $7,100,000 in 1941 and $7,300,000 in 1942. Taxpayer would have had a one-sixth interest if her construction of the will had been the correct one (R. 41a, 71a).

[4] The taxpayer's petition changes the order of the first two issues, both of which involve her depletion deduction for the taxable years. Logical sequence requires consideration of the basis question first.

*infra*, pp. 19-20); Treasury Regulations 103, Section 19.113(a)(5)-1(a) and (b) Appendix, *infra*, pp. 23-25). Fair market value at the time of the death of the decedent is likewise the standard used in appraising property for the purposes of the Federal estate tax. Treasury Regulations 103, Section 19.113(a)(5)-1(c) (Appendix, *infra*, p. 25). The Commissioner relied on the valuation as finally determined in the 1919 estate tax return. This valuation was based on an estimate of the quantity of ore in the land, prepared by the lessee and accepted by the lessor, which had been carefully prepared on the basis of the best information available as of March 2, 1919 (R. 52a-53a). The estimate had not only been accepted by the Minnesota Tax Commission after being checked and verified by the School of Mines of the University of Minnesota, but was used by the executor of Burt's estate and by the taxpayer herself in computing her depletion allowances from 1919 to 1941 (R. 47a-49a).

Fair market value as of a particular date is, of course, a pure question of fact. The Tax Court weighed the evidence carefully and concluded that the fair market value on March 2, 1919 was that determined by the Commissioner and that there was no evidence to show that, on the basis of facts known on that date, the property could have been sold for a larger sum (R. 50a, 54a). The petitioner's contention that the Tax Court applied a

novel principle of valuation (Pet. 27) is refuted by examination of that court's opinion (R. 51a-54a), which shows that it applied no particular criterion of value, but simply examined the evidence to see whether it could support a finding that, on March 2, 1919, the property could have been sold for a sum higher than the contemporary estimate of all the interested parties. The Tax Court's finding of fact is fully supported by the evidence, and there is no reason why this Court should reexamine the issue.

2. The second issue also involves a factual question. Taxpayer is entitled to recover her depletion basis on her interest in the Burt lands through annual deductions computed by dividing the $916,262.74 by one-sixth of the number of estimated tons of ore in the lands and multiplying that depletion unit by the number of tons actually sold during the year. From 1919 up to and through the taxable years 1938 through 1941, taxpayer claimed depletion deductions on the basis of the lessee's 1919 estimate of recoverable ore, despite the fact (see R. 48a) that the lessee's 1919 estimate was increased with the years as the result of operations and development work.[5]

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[5] Taxpayer seems to suggest that the increase in the 1919 estimate did not result from operations or development work. (See Pet. 20, 24.) As to the period 1919 to 1925, one of taxpayer's own witnesses testified that drilling increased the lessee's estimates. (See R. 293a-294a.)

Section 23 (m) of the Code provides that, in any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance for depletion for subsequent years shall be based upon such revised estimate.[6] Under the pertinent Regulations, this ascertainment may be made by either the taxpayer or the Commissioner. Treasury Regulations 103, Section 19.23(m)-9 (Appendix, *infra*, pp. 21-23). The Commissioner revised taxpayer's depletion unit and deductions for 1938 through 1941 (on the basis of an ascertainment made by him in 1943, R. 329a), and the Tax Court found as a fact that "Prior to 1938 the petitioner knew that the ore reserves were greater than indicated by the prior estimates." (R. 49a.) That finding, as the Tax Court stated (R. 58a), is amply supported by the record on the basis of facts known and reasonably ascertainable.[7] Taxpayer's attack upon that conclusion (see Pet. 20, 22-26) furnishes the only real point of controversy

[6] The purpose of such a revision is to distribute the remaining undepleted balance of the depletion basis over the remaining years of production on the basis of the current estimates of ore reserves.

[7] It will be noted that, as the Tax Court stated (R. 58a), on the first issue taxpayer argues that on facts known in 1919 the ore reserves were greater than estimated and on this issue she argues that she had not ascertained those same facts by 1938.

on this issue and that, of course, is on a factual question.[8]

*Petit Anse Co.* v. *Commissioner,* 155 F. 2d 797 (C.A. 5), certiorari denied, 329 U.S. 732, upon which the taxpayer relies to establish a conflict, stands only for the proposition that "the revision for depletion *when discovered* as a result of operations or development work will be only as to the allowance for depletion in subsequent taxable years . . ." 155 F. 2d at 798. The Court of Appeals in that case explicitly grounded its decision on the facts that: "(1) There is no evidence to support a finding that the taxpayer had discovered [that his mine contained greater reserves than originally estimated] before the tax years, or at any time before trial; and (2) The Judge of the Tax Court never undertook to make any such finding." 155 F. 2d at 799. Here, as above indicated, there was ample evidence to support such a finding of fact, and the Tax Court expressly made it (R. 49a, 58a).

3. On the third issue the courts below held that the portion of the royalties from the Burt lands withheld by the trustee from the taxpayer (and the other heirs) constituted taxable income to her

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[8] Taxpayer also "submits" that a revision which was not begun by the Commissioner until 1943 or completed until 1948 cannot apply to the years 1938 through 1941 (Pet. 26) but gives no reason therefor. Those years were still open (R. 55a).

(R. 62a-66a). The decision was based on the fact that, pursuant to the compromise agreement, the retained royalties constituted repayment of a loan made to the heirs by the trustee for the purpose of paying federal estate and state inheritance taxes, which, under the compromise agreement, were chargeable to the heirs.

The decision on this issue is clearly correct and, contrary to taxpayer's assertions (Pet. 40, 50), is not in conflict with *Corbett Investment Co.* v. *Helvering*, 75 F. 2d 525 (C.A. D.C.). In that case the testator's three grandchildren received all of the testator's residuary estate subject to a charge on the rents from the real estate of $1,000 a month payable to the testator's widow. The widow later released the estate of the obligation in consideration of the grandchildren's personal undertaking to continue paying her $1,000 a month, and still later the grandchildren transferred the real estate to the newly organized taxpayer-corporation in consideration for all of the corporation's capital stock and the assumption of their liability of paying the $1,000 a month to the testator's widow. The court incidentally stated that the estate was not taxable on the payments to the widow prior to release of the estate, but no question in that connection was involved. So far as even remotely pertinent here, the court's holding was that the taxpayer-corporation was not entitled to a deduction for the monthly payments it made to the

widow, because the payments constituted a capital investment as being part of the purchase price of the real estate transferred to it by the grandchildren. Taxpayer not only fails to explain in what manner the decision is in conflict with the instant decision but distinguishes the case (Pet. 42). Perhaps she is relying upon the case for the proposition that one who inherits property subject to an income charge in favor of another is not taxable on such income. If so, it is a sufficient answer that the instant case involves the inheritance of a fee simple interest in property accompanied by a quite distinct personal obligation to pay certain taxes in connection with such property.[9]

4. The courts below denied taxpayer deductions for alleged charitable gifts made in 1939, 1940, and 1941, primarily on the ground that the taxpayer had given away nothing of value.[10] The purported gifts were of parts of taxpayer's asserted interest in the trust of personalty created by her father's will. The gifts had value only if taxpayer had a vested remainder interest in her father's trust of personalty. She did not have a vested

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[9] The Tax Court decisions with which taxpayer asserts the decision below is in conflict (Pet. 50) are all also similarly distinguishable.

[10] The court's determination that the alleged gifts had no value made it unnecessary to consider whether they were otherwise deductible as charitable or educational gifts of a present interest.

remainder interest, for in 1947, after extended litigation in a suit by taxpayer and others for a construction of the will, the Supreme Court of Michigan held that the "legal heirs" to whom distribution was to be made at the termination of the trust (after about a hundred years) meant legal heirs as of the termination of the trust.

There is no merit in taxpayer's assertion (Pet. 51) that consideration by the courts below of the decision of the Supreme Court of Michigan was contrary to the principle of *Ithaca Trust Co.* v. *United States,* 279 U.S. 151. The *Ithaca Trust Co.* decision stands for the proposition that value as of a particular date is not affected by subsequent events. Here the courts below did not use a subsequent event to change value as of the time of the gifts; they accepted a subsequent decision as controlling with respect to the subject matter of the gifts and determined value as of the time of the gifts. *United States* v. *Lewis,* 340 U.S. 590, also relied upon by the taxpayer (Pet. 52, 56), did not involve a gift or a valuation question and is inapposite.

Taxpayer is in error in asserting a conflict with respect to the alternative holding (R. 72a) that, even if the purported gifts should be given a speculative value, there is no basis in the record for determining such a value. The "conflict" in that connection asserted by taxpayer (Pet. 54) is with a decision of the court below. *Cohan* v. *Commissioner,* 39 F. 2d 540 (C.A. 2).

## CONCLUSION

The decision below is correct and presents no question requiring further review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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JULY, 1952.

APPENDIX

Internal Revenue Code:[9]

SEC. 22. GROSS INCOME.

(a) [as amended by Sec. 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

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(26 U.S.C. 1946 ed., Sec. 22)

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[9] The Revenue Act of 1938, c. 289, 52 Stat. 447, applicable to the taxable year 1938, contains provisions substantially identical to the provisions quoted from the Internal Revenue Code, which is applicable beginning in 1939.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. * * *

(o) *Charitable and Other Contributions.*—In the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

* * * * * *

(2) [as amended by Sec. 224 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862]

A corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possessions thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual, * * *

* * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * * *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *

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(26 U.S.C. 1946 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

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(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * * *

(26 U.S.C. 1946 ed., Sec. 114.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.23(m)-2. *Computation of depletion of mines, oil and gas wells, and other natural deposits without reference to discovery value or percentage depletion.*—The basis upon

which depletion, other than discovery depletion or percentage depletion, is to be allowed in respect of any property is the basis provided in section 113 (a), adjusted as provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property. (See sections 19.113 (a)-1 to 19.114-1, inclusive.) If the amount of the basis as adjusted applicable to the mineral deposit has been determined for the taxable year, the depletion for that year shall be computed by dividing that amount by the number of units of mineral remaining as of the taxable year, and by multiplying the depletion unit, so determined, by the number of units of mineral sold within the taxable year. In the selection of a unit of mineral for depletion, preference shall be given to the principal or customary unit or units paid for in the products sold, such as tons of ore, barrels of oil, or thousands of cubic feet of natural gas.

* * * * * *

Sec. 19.23(m)-9 [as amended by T.D. 5054, 1941-1 Cum. Bull. 227]. *Determination of mineral contents of mines and of oil or gas wells.*—If it is necessary to estimate or determine with respect to any property as of any specific date the total recoverable units (tons, pounds, ounces, barrels, thousands of cubic

feet, or other measure) of mineral products reasonably known, or on good evidence believed, to have existed in the ground as of that date, the estimate or determination must be made according to the method current in the industry and in the light of the most accurate and reliable information obtainable. In the selection of a unit of estimate, preference shall be given to the principal unit (or units) paid for in the product marketed. The estimate of the recoverable units of the mineral products in the property for the purposes of valuation and depletion shall include as to both quantity and grade—

(a) The ores and minerals "in sight," "blocked out," "developed," or "assured," in the usual or conventional meaning of these terms with respect to the type of the deposit, and

(b) "Probable" or "prospective" ores and minerals (in the corresponding sense), that is, ores and minerals that are believed to exist on the basis of good evidence although not actually known to occur on the basis of existing development; but "probable" or "prospective" ores and minerals may be estimated (1) as to quantity, only in case they are extensions of known deposits or are new bodies or masses whose existence is indicated

by geological or other evidence to a high degree of probability, and (2) as to grade, only as accords with the best indications available as to richness.

If the number of recoverable units of mineral in the property has been previously estimated for the prior year or years, and if there has been no known change in the facts upon which the prior estimate was based, the number of recoverable units of mineral in the property as of the taxable year will be the number remaining from the prior estimate, but in any case in which it is ascertained either by the taxpayer or the Commissioner as the result of operations or development work prior to the close of the taxable year that the remaining recoverable mineral units as of the taxable year are materially greater or less than the number remaining from the prior estimate, then the estimate of the remaining recoverable units shall be revised and the annual depletion allowance with respect to the property for the taxable year and for subsequent taxable years will be based upon the revised estimate unless a change in the facts requires another revision. Such revised estimate will not, however, affect the basis for depletion.

Sec. 19.113(a)(5)-1. *Basis of property acquired by bequest, devise, or inheritance.*—

(a) *Property included.*—Section 113 (a)(5) applies—

(1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents; and

(2) to property passing under an instrument which, under section 113 (a)(5), is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113 (a)(5).

(b) *Basis.*—Section 113 (a)(5) provides two rules for determining the basis of property transmitted at death, a rule governing property generally and a special rule governing stock in a foreign personal holding company.

(1) *General rule.*—Except as prescribed in paragraph (2) the basis of property acquired from a decedent by will or under the law governing the descent and distribution of the property of decedents is the fair market value at the time of such acquisition. Since, under the law governing wills and the distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the

decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise, the time of the acquisition of such property is the death of the decedent.

* * *

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(c) *Fair market value.*—For the purposes of this section, the value of property as of the date of the death of the decedent as appraised for the purpose of the Federal estate tax or if the property is not appraised as of the date of death of the decedent for such purpose or if the estate is not subject to such tax, its value as appraised as of the date of the death of the decedent for the purpose of State inheritance or transmission taxes, shall be deemed to be its fair market value at the time of the death of the decedent.

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